

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of NEWBERRY, Minors.

UNPUBLISHED
October 21, 2014

No. 320423
Houghton Circuit Court
Family Division
LC No. 12-000013-NA

In the Matter of NEWBERRY, Minors.

No. 320424
Houghton Circuit Court
Family Division
LC No. 12-000013-NA

Before: BORRELLO, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

The trial court terminated respondent mother’s parental rights to her son and daughter pursuant to MCL 712A.19b(3)(g) and (j), and terminated respondent father’s parental rights to his daughter pursuant to these same grounds, as well as MCL 712A.19b(3)(l).¹ Respondent mother appeals as of right in Docket No. 320423, and respondent father appeals as of right in Docket No. 320424. For the reasons set forth in this opinion, we affirm in both appeals.

Respondent mother first argues that she was denied the effective assistance of counsel. “[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings.” MCL 712A.17c(7); *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2001), overruled on other grounds in *In re Sanders*, 495 Mich 394, 422; ___ NW2d ___ (2014). Accordingly, respondent mother’s failure to raise this issue in a motion for a new trial or to request a *Ginther*² hearing limits our review to mistakes apparent

¹ Respondent father was the biological father of respondent mother’s son, but his parental rights to that child had previously been terminated.

² *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

from the record. Compare *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Whether respondent mother was denied the effective assistance of counsel is “a question of constitutional law subject to de novo review.” *In re CR*, 250 Mich App at 197. To establish ineffective assistance of counsel, respondent mother “must show that her trial counsel’s performance was deficient, i.e., she must show that counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced her that it denied her a fair trial.” *Id.* at 198 (citations and internal quotations omitted).

Respondent mother argues that her attorney should have moved for dismissal of the petition before she tendered a plea to the allegations in the petition, including an allegation that her five-year-old son and 15-month-old daughter were found to be “residing in a home environment in which illegal drugs were being used and chemical agents used in the production of methamphetamine were present,” and a methamphetamine laboratory allegedly being operated by respondents was seized. Respondent mother posits that the original petition would have been dismissed before jurisdiction was assumed had counsel done so, because the children were not endangered on June 24, 2012, because no methamphetamine was ultimately found.

MCL 722.637 requires the Department of Human Services (DHS) to petition the court to assume jurisdiction over a child under MCL 712A.2(b) within 24 hours after determining that a child was “allowed to be exposed to or have contact with methamphetamine production” unless the parent is not a suspected perpetrator and

- (a) The parent or legal guardian did not neglect or fail to protect the child.
- (b) The parent or legal guardian does not have a historical record that shows a documented pattern of neglect or failing to protect the child[, and]
- (c) The child is safe in the parent’s or legal guardian’s care.

This statute does not require that methamphetamine itself be present, but that there be methamphetamine *production*.

Even if the process of manufacturing methamphetamine was not completed, respondent mother does not dispute that an attempt was made to produce methamphetamine. Moreover, although no methamphetamine was found, pots used for methamphetamine production were found, her son had a bag with remnants of the makings of methamphetamine, and a non-parent who admitted being involved in the production of methamphetamine and who fled the scene with respondent mother explained that the reason no methamphetamine was found was that they took the product that was in the process of being manufactured. Respondent mother’s son was able to describe methamphetamine production, strongly indicating that he had witnessed the process. Finally, it is not disputed that respondent mother was arrested in connection with methamphetamine production and that, before the adjudication hearing, she entered a plea in criminal proceedings to attempted methamphetamine production. Given these undisputed facts, the filing of the petition seeking jurisdiction over the children was required and there would have been no basis for dismissal of the petition filed in this case. Accordingly, respondent mother cannot establish ineffective assistance of counsel.

Both respondents argue that the trial court erred in finding that termination of parental rights was in the children's best interests. If the trial court finds that there are grounds for termination of parental rights, it must terminate parental rights if it finds that termination is in the child's best interests. MCL 712A.19b(5). "In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012). "The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App 701, 714; 846 NW2d 61 (2014). The propriety of the best interests finding is determined by reference to a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). The trial court's determination regarding the child's best interests is reviewed for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). To establish clear error, this Court must be left with a definite and firm conviction that a mistake has been made.

Both parties argue that because they had made substantial progress in addressing their substance abuse issues, it would have been in the children's best interests to give them more time to sort through the remaining barriers to reunification. However, the trial court did not clearly err in finding otherwise. Both parents had recently relapsed and, while this may not be an unusual occurrence in substance abuse recovery, as the trial court noted, neither parent had demonstrated a commitment to the aftercare that would raise the odds that their recoveries would remain successful. Moreover, there was evidence that the children had serious behavioral problems that were exacerbated with parental visitations and that permanency would likely alleviate some of these problems. Further, the evidence indicated that under the best of circumstances respondents would not be in a position to assume care and custody for at least six months and whether they would reach this goal was at best uncertain. The trial court's finding that permanency was essential given the children's behaviors is supported by the evidence, and its conclusion that "expecting the children to wait for permanency any longer is not in their best interests" is not clearly erroneous.

We note that although a child's placement with relatives must be considered in determining whether termination of parental rights is in a child's best interests, *In re Olive/Metts*, 297 Mich App at 43, and weighs against termination, *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010), here the trial court did not clearly err in finding that placement with an uncle would not be in the children's best interests. The children were 15 months old and five years old when taken into protective custody where they remained for approximately 18 months. The uncle did not see them during that time and was not even aware that they had been taken into custody during the first year. There was no evidence from which the trial court could conclude that there was an attachment between the minor children and the uncle. Additionally, it was not yet clear whether the uncle would be approved by authorities for placement, hence future placement with a relative was merely a possibility. Also, the trial court correctly found that with placement there was a risk that the children would encounter their parents in the future. Under these circumstances, there was no clear error in the trial court's determination that it would not be in the children's best interests to place them with the uncle.

We conclude that the court's finding that permanency was essential given the children's behaviors is supported by the evidence, and its conclusion that "expecting the children to wait for permanency any longer is not in their best interests" is not clearly erroneous.

Affirmed.

/s/ Stephen L. Borrello

/s/ Deborah A. Servitto

/s/ Douglas B. Shapiro